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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PATRICK KELLY, Plaintiff and Appellant, v. SHANE CLARIDGE KELLEY, as Executor, etc. et al. Defendants and Respondents.	A153667 (San Francisco City and County Super. Ct. No. CGC-13-535823)

This is the third appeal generated by this dispute. Here is what we said at the beginning of our last opinion:

"This is the second appeal arising from an alleged employment relationship between appellant Patrick Kelly and Thomas White, now deceased. Appellant's first case against White resulted in a judgment in favor of White's estate, which this court recently affirmed. (Case No. A138423.) The present case arises from the same underlying facts and asserts some of the same and some different causes of action. The trial court sustained demurrers to all causes of action without leave to amend and entered judgment for respondents. Appellant contends the court abused its discretion. We affirm the judgment as to six of the eight causes of action alleged in the complaint. As to two causes of action [i.e., for breach of a 2005 contract and quantum meruit], however, we agree with appellant that the trial court erred. We reverse the judgment with respect to these two causes of action and remand the matter for further proceedings." (*Kelly v. Teeters* (Jan. 6, 2015, A141503) [nonpub. opn.].)

On January 2, 2018, a Judgment on jury verdict was entered, recording that Patrick Kelly should take nothing by his complaint, the jury having found (1) there was no contract to breach, and (2) Kelly had already received full value of any services he had provided. On January 31, 2018, Kelly filed a notice of appeal from this judgment. However, a perusal of his opening brief discloses that his only contention challenges the propriety of an order filed and entered (with notice given of that entry) on July 10, 2015. In its entirety, the order reads:

"Plaintiff's Motion for Leave to File First Amended Complaint came on for hearing on July 10, 2015, at 9:30 a.m., in Department 302 of the above-entitled court, Hon. Ernest H. Goldsmith, Judge Presiding. Geoffrey Rotwein appeared for defendant and plaintiff did not appear.

"The court having considered the pleadings on file and for and against plaintiff's motion, along with the argument by Mr. Rotwein, hereby grants in part and denies in part the motion as follows:.

"The motion is granted with respect to the First-Fourth Causes of Action in plaintiff's Proposed First Amended Complaint but is denied as to the Fifth-Tenth Causes of Action."

This type of order is not independently appealable, but it can be reviewed on appeal from a final judgment. (Code Civ. Proc., § 906; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128.) Ordinarily, we would review "a trial court's denial of leave to file an amended complaint for an abuse of discretion" (*Thousand Trails, Inc. v. California Reclamation Dist. No. 17* (2004) 124 Cal.App.4th 450, 464), meaning we could reverse only if we concluded the challenged ruling exceeded the bounds of reason. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.)

However, Kelly contends his appeal should be treated differently: "[A]fter granting appellant's motion to amend in its tentative [ruling], the lower court went on to treat the motion as a special anti-SLAPP motion to strike during the hearing and struck causes 5-10 from the proposed Verified First Amended Complaint. Since anti-SLAPP arguments were the only arguments respondents made during the hearing, one can only

conclude the court changed its tentative ruling based on anti-SLAPP law normally relevant within a special anti-SLAPP motion to strike. Because motions are defined by the way they are actually adjudicated rather than how they are titled, in this case the lower court's ruling is appealable as a special anti-SLAPP motion to strike under [Code of Civil Procedure section] 425.16[, subdivision] (i)."

We do not see the issue of appealability in this way. It is true that a ruling on an anti-SLAPP Motion is independently appealable. But Kelley's argument is self-defeating. If Judge Goldsmith's 2015 order were to be treated as he suggests, we could not reach the merits because the time within which to appeal from that order has long since expired (see Cal. Rules of Court, rule 8.104) and we would be compelled to dismiss the appeal. (See *In re Chavez* (2003) 30 Cal.4th 643, 650 [" [A] timely notice of appeal is ' "essential to appellate jurisdiction." ' . . . 'An untimely notice of appeal is "wholly ineffectual: The delay cannot be waived, it cannot be cured by nunc pro tunc order, and the appellate court has not power to grant relief, but must dismiss the appeal on motion of a party or on its own motion." ' "].)

It is true that during the course of the hearing on the tentative ruling (which Kelly did not attend) opposing counsel did make some anti-SLAPP references. Yet a fair reading shows that counsel's opposition to amendment—which was only partial—was not an actual anti-SLAPP motion. Rather, counsel's opposition was based on the litigation privilege (Civ. Code, § 47, subd. (b)):

"What I'm saying, Your Honor, is that . . . all of the conduct that Mr. Kelly wishes to include in his proposed amended complaint, all of it, Your Honor, and giving rise to all of his causes of action relate only to the litigation conduct in . . . this case . . . ." "There's no conduct outside of what my client and I did in terms of handling the defense . . . in this case. . . . [¶] That's all clearly and without doubt on its face anti-SLAPP conduct, and I just think that rather than—I mean, we're going to be doing the same motion if the amendment is allowed."

That this was not a true anti-SLAPP motion is also demonstrated by something mentioned by counsel in his written opposition, specifically the absence of a request for

the mandatory award of attorney fees allowed by the anti-SLAPP statute. (See Code Civ. Proc., § 425.16, subd. (c)(1).)

Continuing in the same vein, Kelly argues "[s]ince Judge Goldsmith's decision was in response to anti-SLAPP arguments that the transcript shows were the only arguments respondents made during the hearing, one must conclude the lower court ruled based solely on anti-SLAPP arguments," thus making "the lower court's decision to change its tentative ruling . . . arbitrary and capricious." In sum, Judge Goldsmith's decision should be reversed because he listened to counsel who was exercising his right to contest a tentative ruling, and because he "wrongly accepted respondents' argument that it had discretion to deny leave to amend based upon anti-SLAPP law without requiring a proper special anti-SLAPP motion to strike."

This argument will not prevail. We review a lower court's actual decision, and remarks or comments made by the court cannot be used to overturn an ensuing order or judgment. (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.) This is even truer when the comments are made, not by the court, but by counsel. Moreover, "a trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling." (*Ibid.*) Judge Goldsmith's actual order was quoted in its entirety to demonstrate that it furnishes no evidence to conclude it was an anti-SLAPP ruling.

The remainder of Kelly's arguments attack the order's purported defects as an anti-SLAPP ruling. He makes no effort to establish that Judge Goldsmith abused his discretion in denying leave to file an amended complaint. Such an effort would fail.

The original complaint was 32 pages; Kelly's proposed amended complaint was more than triple that—109 pages, with hundreds of pages of attached exhibits. Up to now, the controversy had been confined, as we put it, to the "alleged employment relationship between appellant Patrick Kelly and Thomas White." Counsel opposing amendment told the court in his papers that, six years after litigation began, Kelly was asking to add two new parties—a former trustee and current counsel for the trust—plus six new causes of action based on the proposed new parties' "statements and conduct [in

the] previous action . . . , along with their conduct related to the defense in the instant case."

Opposing counsel summarized the gist of the proposed additional causes of action: "Allowing plaintiff's suit would mean that whenever a party prevails in a lawsuit, the losing party could sue the successful party and his/her attorney for their conduct and statements during and related to that litigation. . . . The law does not recognize a cause of action by a losing party against the prevailing party and his lawyer for tortiously *winning* the lawsuit. Nor may plaintiff sue for conduct and statements related to the litigation in the *instant* non-final case, namely the legitimate filing of a demurrer that was completely successful in this court and then affirmed on appeal for six of eight COAs with dismissal of two of three defendants. In sum, there is no cognizable cause of action for tortiously *defending* a lawsuit, particularly a non-final lawsuit." Counsel also noted that "plaintiff's new claims would require revisiting discovery and relitigating motions and the trial in the previous case." Finally, counsel demonstrated that three of the proposed causes of action were time-barred.

The trial court was empowered to consider any legal defects with the proposed pleading. (E.g., *Kilgore v. Younger* (1982) 30 Cal.3d 770, 781 [" 'Leave to amend should be denied where . . . under the substantive law, no liability exists' "]; *Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 1011 ["leave to amend need not be granted if any possible amendment would inevitably be barred by the statute of limitations"]; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230 ["if the proposed amendment fails to state a cause of action, it is proper to deny leave to amend"]; cf. *Yee v. Mobilehome Park Rental Review Bd*. (1998) 62 Cal.App.4th 1409, 1428 [denial of leave to amend is proper where "the proposed amendments were offered more than two years after the original complaint was filed, and shortly before a final resolution of all of the issues remaining before the superior court"].) The record here demonstrates more than an ample basis for Judge Goldsmith's decision.

The judgment is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

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